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No. 94-1760

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

60 KEY CENTRE, INC.,

Petitioner,

vs.

ADMINISTRATOR OF GENERAL SERVICES ADMINISTRATION and ACQUEST HOLDING INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT ACQUEST HOLDINGS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

VICTOR C. SILVERSTEIN
Counsel of Record
LIPPES, SILVERSTEIN, MATHIAS & WEXLER L.L.P.
Attorneys for Respondent Acquest Holdings, Inc.
700 Guaranty Building
28 Church Street
Buffalo, New York 14202
(716) 853-5100

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QUESTION PRESENTED

Whether an award of a lease should be declared invalid and enjoined when the issue is moot and would cause substantial social and economic cost to the government?

LIST OF PARTIES

The parties to the proceedings are:

Petitioner:
60 Key Centre, Inc.

Respondents:
Administrator of the General Services Administration and Acquest Holdings, Inc.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 47 F.3d 55. The opinion of the district court (Pet. App. 18a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15a-16a) was entered on February 1, 1995. The petition for a writ of

certiorari was filed on April 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Petitioner is the unsuccessful bidder on a project to lease space to the U.S. Attorney's Office for the Western District of New York in Buffalo, New York. Although there were only three bidders, petitioner's offer to lease space was inferior to the bids of the other two bidders. (Pet. App. 4a-5a, 20a-21a, joint appendix submitted to the Court of Appeals, "JA" 372-375).

Petitioner commenced an action on February 23, 1993, seeking an injunction prohibiting respondents Administrator of General Services Administration ("GSA") and Acquest Holdings, Inc. ("Acquest") from proceeding with an award of the lease to Acquest and a declaratory judgment directing GSA to award the lease to petitioner. Petitioner waited until June 3, 1993 to move for a preliminary injunction and did not file supporting memorandum until October 15, 1993. (Pet. App. 5a-6a). The hearing in the case took place on December 22, 1993, by which time Acquest had completed construction of the project and the GSA had preliminarily accepted the office space. By the time the district court's opinion was issued on January 25, 1994, the U.S. Attorney had moved into the new premises. (Pet. App. 6a)

REASONS FOR DENYING THE WRIT

POINT 1

THE ISSUE IS MOOT

Petitioner no longer had the space available that it originally offered, and, therefore, the court could not award the lease to petitioner because petitioner could no longer offer the government the space that it initially offered. In view of the foregoing, their offer of space would be moot since it was occupied by another of petitioner's tenants. (Pet. App. 31a, 34a-35a)

Even if the lower court were to have rejected the Acquest bid, the bid of petitioner was the worst of the three bids submitted and, therefore, it would not have received the award in any event, making the issue moot. (Pet. App. 4a-5a, 20a-21a, JA 372-375).

POINT 2

SETTING ASIDE THE AWARD WOULD BE UNFAIR AND RESULT IN CHAOS AND CONFUSION

It is submitted that the petitioner was dilatory in bringing its motion for a preliminary injunction, a period of approximately four months, and in failing to file a supporting memorandum for at least eight months, thereby allowing the construction to be completed and the U.S. Attorney to move into the space that was let. Therefore, to allow the petitioner to upset this award, when it was clearly guilty of laches by allowing the construction to proceed without pushing for its preliminary injunction, would not be fair and would only result in confusion and chaos. The U.S. Attorney's Office has been in the space for one and a half years and the U.S. District Court is to occupy its former space.

The courts have uniformly held that the courts are "ill equipped to settle the delicate questions involved in procurement decisions". *Elcon Enterprises v. W.M.A.T.A.*, 977 F.2d 1472, 1478 (D.C. Cir. 1992). The complexity of procurement awards and the deference that should be given to an agency decision is discussed in *Kentron Hawaii Ltd. v. Warner*, 480 F.2d 1166, 1182 (D.C. Cir. 1973).

A factor in the finding against the petitioner in the court below was the fact that the U.S. Attorney's Office had moved into the space and that the U.S. District Court for the Western District of New York was going to occupy the space of the U.S. Attorney's Office. Therefore, the cost - social and economic - of interrupting those functions by directing a change just as the United States Attorney's Office has moved into or

is about to move into the Acquest space would be substantial. (Pet. App. 33a-34a).

POINT 3

A BALANCING OF THE EQUITIES IS IN FAVOR OF ACQUEST

Although it is submitted that there has been no violation of federal regulations, the injunction sought by petitioner should not be granted even if there was a violation of federal regulations since it may be "inappropriate in order to secure faithful compliance with federal contracting laws, to interrupt" the contract. *Delta Data Systems Corp. v. Webster*, ("Delta Data II") 755 F.2d 938, 939 (D.C. Cir. 1985). Similarly, injunctive relief is not appropriate where it can only be granted "at a cost to the government that would greatly exceed the benefits derived from requiring observance of the proper procedures in the particular case." *Delta Data Systems Corp. v. Webster* ("Delta Data I"), 744 F.2d 197, 207 (D.C. Cir. 1984).

A court's "main objective" in "framing a remedy is to assure that the government obtains the most advantageous contracts by complying with the procedures which congress and applicable regulations provided." *Id.* Even where an agency has violated those procedures, it has been ruled that the public interest in deterring improper procurement practices must be weighed against the harm that injunctive relief would impose on the government. Hence, in *S.W.D. Associates Ltd. v. United States General Service Administration*, 1988 W.L. 242631 (N.D. Cal. 1988), the court ruled that an injunction of performance of a government contract was not warranted where performance had commenced and an injunction would impose substantial cost on the government.

Certainly, in the case at bar to require the U.S. Attorney to vacate space that it has occupied for one and a half years and seek new space would impose extraordinary expense upon the government. GSA would have to commence its procurement process all over again since petitioner's space is no longer available.

POINT 4

THERE IS NO CONFLICT AMONG THE CIRCUITS NOR IS THIS AN IMPORTANT ISSUE OF FEDERAL LAW

Acquest respectfully submits that there are no "special and important reasons" for this Court to exercise its discretion to grant the writ of certiorari sought by petitioner. (Sup. Ct. Rule 10.1) The decision of the Court of Appeals for the Second Circuit (the "Decision") does not conflict with the decisions of any other circuit courts on the same matter. It does not involve an important question of federal law. Nor does it decide a federal question in a way that conflicts with the applicable decisions of this Court. The issue is certainly not of sufficient importance for this Court to grant certiorari.

In addition, petitioner does not even claim that the Decision conflicts with any decision of another Court of Appeals or of this Court. It only claims that the Decision conflicts with the decision of the Court of Federal Claims, however, the only issue raised by petitioner was not presented on the appeal to the Court of Appeals for the Federal Circuit. (Pet. App. 8a n.4)

The issue of the validity of GSAR paragraph 552.270.3(a) sought to be raised by petitioner herein is not one which was raised as an issue in the appeal to the Court of Appeals for the Federal Circuit in *Aerolease Long Beach v. United States*, 31 Fed. Cl. 342 (1994), *aff'd*, 39 F.3d 1198 (Fed. Cir. 1994) nor was it an issue for the district court in this case. (Pet. App. 8(a)).

Part of the district court's decision was due to the fact that the petitioner was dilatory in moving for injunctive relief and, during that period of time, Acquest completed construction of the premises and the tenant occupied the premises. The Decision is correct.

The issue involved herein is a matter of minor importance in the overall structure of the law so that resolution of the issue by this court is unnecessary, particularly, when it is

uniformly held that procurement decisions are best decided by agencies, rather than have a reviewing court substitute its judgment for that of the agency. The delicate questions involved in procurement decisions has been well recognized by the courts as best being decided by agencies due to the maze of complex statutory and decisional rules. *Delta Data I*, 744 F.2d at 203.

CONCLUSION

Therefore, there are no "special and important reasons" for this Court to exercise its discretion to grant the writ of certiorari sought by petitioners.

Dated: June 21, 1995

Respectfully submitted,

VICTOR C. SILVERSTEIN
Counsel of Record
LIPPES, SILVERSTEIN, MATHIAS & WEXLER L.L.P.
Attorneys for Respondent ACQUEST HOLDINGS, INC.
700 Guaranty Building
28 Church Street
Buffalo, New York 14202
(716) 853-5100